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No. 80-2014

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL SAMARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The question presented in this criminal tax case is whether the court of appeals correctly held that the prosecution for attempted tax evasion and filing a false tax return was timely because the six-year statute of limitations under Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C.) began to run from the time petitioner filed his amended 1971 income tax return upon which he was indicted and convicted, rather than from the time he filed his original 1971 tax return.

The pertinent facts may be summarized as follows: Petitioner originally filed his 1971 tax return on September 15, 1972 (Pet. App. 13a), after having received an automatic extension and two additional extensions of time within which to file his return (Pet. App. 12a). Thereafter, petitioner filed an amended return for 1971 on February 14, 1973 (Pet. App. 13a). The only change petitioner made on this amended return was the revision of a depreciation schedule (Pet. App. 18a). The Internal Revenue Service filed the amended return and recognized the increased depreciation claim (Pet. App. 6a).

On January 4, 1979, an indictment was returned against petitioner in the United States District Court for the Western District of Oklahoma (Pet. App. 5a). Count I of the indictment charged petitioner with filing a tax return for 1971 on February 14, 1973, that understated the gross income from his law practice, in violation of 26 U.S.C. 7206(1). Count II of the indictment charged petitioner with willfully attempting to evade his tax liability for 1971 by filing on February 14, 1973, a 1971 tax return that understated the gross income from petitioner's law practice, in violation of 26 U.S.C. 7201. Counts III and IV of the indictment charged identical violations for the year 1972 (Pet. App. 1a, 5a).

Prior to trial, petitioner moved to dismiss the first two counts of the indictment on the ground that the six-year statute of limitations of 26 U.S.C. 6531 began to run when he filed the first return for 1971 on September 15, 1972, so that the statute of limitations had expired prior to the return of the indictment on January 4, 1979. The district court denied petitioner's motion on January 29, 1979. Subsequently, in a memorandum opinion and order filed on April 16, 1979 (Pet. App. 13a-18a), the district

court denied petitioner's motion for reconsideration. The court of appeals dismissed petitioner's pretrial appeal on the ground that it was from a non-final, interlocutory order (Pet. App. 19a-21a). After a jury trial, petitioner was convicted on all four counts. The district court sentenced petitioner to concurrent three-year prison terms upon each count and imposed fines totalling $15,000 (Pet. App. 1a). The court of appeals affirmed (Pet. App. 1a-7a).

ARGUMENT

1. The decision below correctly held that petitioner's prosecution was not barred by the statute of limitations.[1] Sections 6531(2) and 6531(5) of the Internal Revenue Code provide that prosecutions for willful attempted tax evasion (26 U.S.C. 7201) and filing false tax returns (26 U.S.C. 7206(1)) must be instituted within six years after the com-

[1] Petitioner was sentenced to concurrent three-year terms of imprisonment upon each of the four counts of which he was convicted. In addition, he was given concurrent fines of $5,000 upon the first and third counts and concurrent fines of $10,000 upon the second and fourth counts. Here, petitioner challenges only his convictions upon the first two counts of the indictment. Since the sentences imposed upon those counts, however, are concurrent with the sentences imposed upon the third and fourth counts, and petitioner does not challenge his convictions upon the third and fourth counts, this Court could decline to review petitioner's conviction under the concurrent sentence doctrine without reaching the merits. See *Benton* v. *Maryland*, 395 U.S. 784, 791-793 (1969); *United States* v. *Tager*, 479 F.2d 120, 123-124 (10th Cir. 1973), cert. denied, 414 U.S. 1162 (1974). We note that because the court of appeals in this case found that the indictment was timely, it had "no reason to consider the government's alternative argument that the concurrent sentence doctrine should be applied" (Pet. App. 6a).

mission of the offenses. Where the charge relates to the filing of a tax return, the statutory period begins to run on the date of the filing. *United States* v. *Habig*, 390 U.S. 222, 223 (1968).

Petitioner contends that his prosecution under the first two counts of the indictment was barred by the six-year statute of limitations because the statutory period began to run on September 15, 1972, when he filed his first return for the 1971 tax year. He asserts (Pet. 5, 8-9, 11) that the subsequent filing of the amended tax return for 1971 on February 14, 1973, had no effect upon the running of the limitations period because the false statements in the amended return that were the basis of the charges against petitioner appeared in the first return filed for 1971 and were merely repeated in the amended return (*i.e.*, that the amended return contained no new false statements material to the charges in the indictment).

Petitioner's contention, however, is contrary to the plain language of the statutes under which he was prosecuted. Section 7201 of the Code broadly prohibits willful attempts to defeat or evade a tax "in any manner." Section 7206(1) proscribes the false filing of "any return, * * * or other document." As the court of appeals correctly recognized (Pet. App. 6a), "[a]n amended return is 'any return, or other document' within the purview of § 7206(1) and may constitute an attempt to defeat or evade a tax 'in any manner' within the proscription of § 7201." Hence, despite the fact that petitioner's filing of the original tax return for the 1971 year could have served as the basis for charges under Sections 7201 and 7206(1), his filing of the false amended return was a separate violation of Section 7206(1) and Section 7201, when done as an attempt to evade

tax. *Norwitt* v. *United States*, 195 F.2d 127, 133-134 (9th Cir.), cert. denied, 344 U.S. 817 (1952); *Levy* v. *United States*, 271 F. 942, 943 (3d Cir. 1921). Since the statute of limitations began to run on the date of the offense (*i.e.*, when the false amended return was filed), the indictment was timely.

The fact that the amended return contained no new false statements relevant to the charges beyond those in the original return is immaterial. Under the criminal tax statutes, prosecution is not restricted solely to the first act of evasion or to the first false and fraudulent return filed for a particular year. The amended return contained false statements as to the gross income from petitioner's law practice. The fact that petitioner made the same false statements in an earlier return for the same year does not mean that he did not commit a separate offense, as to which the statute of limitations also applied, when the amended return was filed with the Service.[2]

The issue presented by the petition is one that arises infrequently, has generated no conflict among the circuits, and does not in this case affect petitioner's punishment. It does not warrant review by this Court.

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[2] See *United States* v. *Smith*, 13 F.2d 923, 924 (W.D. La. 1926), which discusses *Levy* in the following terms:

> I take it that any act which the taxpayer might do, either under the express requirements of the statute, such as the making of a fraudulent original return, or the filing of subsequent fraudulent proofs, affidavits, etc., whether they be in the nature of an amended return or what not, where the effect and reasonable purpose would be to evade or defeat the tax, would constitute the offense.

2. Petitioner further contends (Pet. 2) that the decision below "conflicts in principle with this Court's recent decisions sustaining the important policy of repose on which criminal statutes of limitations are based * * * and conflicts with this Court's rulings respecting the effect of amended tax returns on the parallel statute of limitations applicable to *civil* tax cases" (emphasis in original). This argument, however, has no application to this case. Here, there has been no extension, tolling, or other enlargement of the six-year statute of limitations under Section 6531; the statute of limitations began to run with the filing of the amended return for which petitioner was indicted. Consequently, the prosecution for Counts I and II of the indictment was in no manner a prosecution of stale criminal charges. See *United States* v. *Marion*, 404 U.S. 307, 332 (1971).[3]

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[3] None of the civil tax cases petitioner cites (Pet. 8) conflicts with the decision below. Although the Court held in *Zellerbach Co.* v. *Helvering*, 293 U.S. 172 (1934), and *National Paper Co.* v. *Helvering*, 293 U.S. 183 (1934), that Congress intended that the civil limitations period should run from the filing of the original return, it was careful to limit its holding to those situations where the original return evinced "an honest and genuine endeavor to satisfy the law" (293 U.S. at 180). *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933), is likewise distinguishable as it did not deal with the filing of tax returns but with an amended claim for refund. Nor does *Florsheim Bros Co.* v. *United States*, 280 U.S. 453 (1930), bear upon this case. It simply held that a "tentative return" could not start the running of the limitations period.

At all events, reliance upon cases applying the statute of limitations upon the assessment of taxes in a civil case in support of an asserted conflict with a criminal case is particularly inappropriate. The civil statute of limitations (26

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

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U.S.C. 6501(c)) expressly provides that there is *no* limitation upon the assessment of tax where a false return has been filed with the intent to evade tax or where there has been a willful attempt to defeat or evade tax.

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